

In the Supreme Court of the United States
OCTOBER TERM, 1971

No.

UNITED STATES OF AMERICA, PETITIONER

v.

**IN RE SEPTEMBER 1971 GRAND JURY,
RICHARD J. MARA, A/K/A RICHARD J. MARASOVICH**

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9-17) is not yet reported.

JURISDICTION

The judgment and mandate of the court of appeals was entered on December 2, 1971 (App. E, *infra*, pp. 24-25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment bars compelling a grand jury witness to furnish the grand jury handwriting and printing exemplars for comparison with writings before it, unless the government shows that the grand jury's request for such exemplars is "reasonable."
2. If the Fourth Amendment requires such a showing, whether the government must establish "reasonableness" in an adversary hearing in open court.
3. If a showing of reasonableness is required, what kind of showing must the government make to meet that standard and whether it must show that the exemplar cannot be obtained from other sources without grand jury compulsion.

STATEMENT

The September 1971 Grand Jury in the Northern District of Illinois is investigating thefts of interstate shipments. It has received as exhibits certain writings which are relevant evidence. Respondent Mara was subpoenaed by the grand jury to furnish handwriting and printing exemplars for comparison with these writings.

Mara appeared before the grand jury pursuant to its subpoena on September 23 and 28, 1971. He was informed that he was a potential defendant in the matter being investigated, and was then directed to furnish the exemplars. On both occasions, he refused to do so.

A petition was then filed in the district court seeking an order directing respondent to furnish the exemplars. The district court, following consideration *in camera* of an affidavit by an F.B.I. agent stating the basis for seeking the exemplars from Mara, ordered him to furnish the exemplars (App. B, *infra*, pp. 18-19). When Mara again refused to do so, the district court adjudged him guilty of civil contempt, and committed him to the custody of the United States Marshal until he obeyed the order (App. C, *infra*, pp. 20-21).¹

The court of appeals reversed (App. A, *infra*, pp. 9-17). Relying on its opinion in *In re Dionisio*, 442 F. 2d 276 (C.A. 7), pending on the government's petition for a writ of certiorari, No. 71-229, it held that "compelling * * * [a grand jury witness] to furnish exemplars of his handwriting and printing is forbidden by the Fourth Amendment unless the Government has complied with its [the Fourth Amendment's] reasonableness requirement * * *" (App. A, *infra*, pp. 10-11).

The court then considered "the procedure the Government must follow in attempting to demonstrate that the proposed seizure of the exemplars is reasonable," and "the content of the reasonableness showing necessary" (*id.* at p. 11). It rejected the *in camera* approach employed by the district court, ruling that "the Government must show reasonableness by presenting its affidavit [or other proof] in open court in

¹ The court of appeals released respondent on bail pending his appeal to that court (App. D, *infra*, pp. 22-23).

order that * * * [the witness] may contest its sufficiency" (*ibid.*). As for "[t]he substantive showing that the Government must make", the court held that the government was required to prove "that the grand jury investigation was properly authorized, * * * that the information sought is relevant to the inquiry, and that * * * the grand jury process is not being abused" (*id.* at pp. 15-16). With respect to the last criterion, the court held that the government's affidavit before the district court was not sufficiently detailed to establish the necessary connection between the identification evidence sought and the purpose to be served. The court also stated that it is "an abuse of the grand jury process for the Government to impose on that body to perform investigative work that can be, and heretofore has been, successfully accomplished by the regular investigative agencies of Government," without first demonstrating "why satisfactory * * * exemplars cannot be obtained from other sources without grand jury compulsion," which had not been done here (*id.* at p. 16).

REASONS FOR GRANTING THE WRIT

This case presents the question of the proper application of the Fourth Amendment to attempts by a grand jury to obtain handwriting exemplars. It thus complements the *Dionisio* case, No. 71-229, which involves voice exemplars. The decision below is much more than a reiteration and extension of *Dionisio*; in requiring an adversary hearing, in finding the government's affidavit insufficient, and in deciding that it is an abuse of the grand jury process

to compel the production of evidence that might be obtained in some other way, the court goes significantly beyond the holding in *Dionisio* that a showing of reasonableness is required.

1. In our petition in *Dionisio*, we set forth at length the reasons why this Court should review the issue whether a grand jury request that a witness furnish physical evidence directly connected to the matter under investigation is not enforceable, unless the government shows that the request satisfies a "reasonableness" test under the Fourth Amendment. It has long been established that the grand jury has broad powers of investigation, and that witnesses before it are not entitled to set limits to the investigation that it is conducting or to be shown the basis for its questions. See *Blair v. United States*, 250 U.S. 273, 281-282; *Hale v. Henkel*, 201 U.S. 43, 65. This power necessarily carries with it the right to obtain evidence from witnesses.

The holding below breaks sharply with the recognized authorities in this area. It greatly expands the protections afforded by the Fourth Amendment in grand jury proceedings, and conflicts with the broad investigatory powers of the grand jury. The ruling is not necessary to safeguard protected rights of witnesses before the grand jury, since any "invasion" of the privacy of witnesses is exceedingly narrow. Compare *Davis v. Mississippi*, 394 U.S. 721, 727; *Schmerber v. California*, 384 U.S. 757, 771.

We rely on our *Dionisio* petition, a copy of which we are serving on respondent, for a full discussion of the pertinent authorities, the significance of the

disposition of this issue, and the appropriateness of review by this Court.

2. The court of appeals also held that the government must establish "reasonableness" in an adversary hearing in open court, and must prove that the exemplars cannot be obtained from other sources without grand jury compulsion. In our view, even assuming arguendo that *Dionisio* is correct, the rulings on these subsidiary issues are incorrect, and present substantial questions that warrant plenary review by the Court. If the Fourth Amendment does limit the powers of the grand jury as *Dionisio* indicates, it is important to settle as quickly as possible the applicable substantive standards and the procedures by which compliance with the Fourth Amendment can be measured.

We submit that the government should be entitled to show that a grand jury request satisfies Fourth Amendment requirements in an *ex parte, in camera* proceeding before a magistrate, as is the customary procedure in analogous Fourth Amendment situations where a search warrant or an arrest warrant is sought. This Court's decision in *Alderman v. United States*, 394 U.S. 165, on which the court below relies (App. A, *infra*, pp. 11-12), is not apposite. The issue there concerned the exclusion of evidence that was the product of an admittedly unlawful search. The basic issue here, in contrast, is whether proposed governmental action is lawful when measured by Fourth Amendment standards. This "threshold question" may properly be decided in *ex parte, in camera* proceedings.

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The showing of reasonableness made by the government here was, we think, adequate. The affidavit submitted to the district court² clearly states the nature of the unlawful activities under investigation by the grand jury, the origin and character of the writings introduced as exhibits before the grand jury, and the suspected relationship of respondent to those writings that led to seeking the exemplars from him. The information thus set out would satisfy Fourth Amendment requirements for a search warrant, and would permit seizure under it of existing exemplars. Though we believe that "reasonableness" in this context demands a less strong showing than probable cause, since the invasion of privacy is so slight, certainly where, as here, that more stringent standard is met, it should be sufficient to satisfy Fourth Amendment limits on the power of the grand jury to compel exemplars. There is no constitutional basis for the requirement of the decision below, that the government show further why exemplars cannot be obtained without grand jury compulsion from other sources through more "regular" government investigative agencies.

² This affidavit is in the record filed in the court below, which we have requested to be transmitted to this Court.

CONCLUSION

The petition for a writ of certiorari should be granted with the petition in No. 71-229.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Acting Assistant Attorney General.

WM. TERRY BRAY,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
Attorney.

DECEMBER 1971.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1971 SEPTEMBER SESSION, 1971

No. 71-1740

IN RE SEPTEMBER 1971 GRAND JURY
RICHARD J. MARA, A/K/A RICHARD J. MARASOVICH,
WITNESS-APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 71-GJ-4060

HON. EDWIN A. ROBSON, *Chief Judge*

DECEMBER 1, 1971

Before FAIRCHILD, CUMMINGS, and KERNER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Pursuant to a grand jury subpoena, petitioner appeared before the September 1971 Grand Jury in the Northern District of Illinois on September 23 and 28, 1971. The Grand Jury was investigating possible violations of the con-

spiracy provision of the Criminal Code (18 U.S.C. § 371) and of the provision proscribing thefts of interstate shipments (18 U.S.C. § 659). The Government advised petitioner that he was a potential defendant in that investigation. On both occasions, he was directed by the foreman of the Grand Jury to furnish handwriting and printing exemplars to its designated agent, but he refused to do so on constitutional grounds. After considering the Government's petition for a court order directing Mara to furnish such exemplars of his handwriting and printing as the Grand Jury deemed necessary, and after considering *in camera* an affidavit of FBI Special Agent William L. Buchanan, the district court ordered Mara to furnish the exemplars to the Grand Jury, obviously agreeing with the United States Attorney that this was "essential and necessary" to the Grand Jury's investigation in order to determine whether petitioner was "the author of certain writings." Later that day Mara refused to obey the court's order and was therefore adjudged in contempt and committed to the custody of the United States Marshal for the Northern District of Illinois "until such time as said respondent shall obey said order."

On appeal, petitioner's principal argument is that the order directing him to furnish the exemplars constituted an unreasonable search and seizure within the meaning of the Fourth Amendment.¹ Under our opinion in *In re Dionisio*, 442 F.2d 276 (7th Cir. 1971) (*per curiam*),² it is plain that compelling peti-

¹ Although petitioner also relies on the Fifth and Sixth Amendments, comparable arguments were rejected in *In re Dionisio*, 442 F.2d 276, 278 (7th Cir. 1971).

² See also *United States v. Bailey*, 327 F.Supp. 802 (N.D. Ill. 1971).

tioner to furnish exemplars of his handwriting and printing is forbidden by the Fourth Amendment unless the Government has complied with its reasonableness requirement,³ and that the present proceeding is not a premature challenge. Specifically, this appeal raises two issues necessarily generated by *Dionisio*. The first concerns the procedure the Government must follow in attempting to demonstrate that the proposed seizure of the exemplars is reasonable. The second focuses on the content of the reasonableness showing necessary to obtain the order sought below.

To show reasonableness, the Government submitted the aforementioned affidavit of Agent Buchanan *in camera* to the district court. The affidavit was then impounded without being shown to petitioner or his counsel. Petitioner challenges the adequacy of this secretive, *ex parte* procedure as nullifying his Fourth Amendment rights and so deficient under the due process clause of the Fifth Amendment.

In our view, to justify the reasonableness of a request to furnish handwriting and printing exemplars to the Grand Jury, the Government must show reasonableness by presenting its affidavit in open court in order that petitioner may contest its sufficiency. Cf. *United States v. Roth*, 391 F.2d 507 (7th Cir. 1967). This will accord with the traditional preference for adversary proceedings as the superior means for attaining justice under our system of criminal justice. *Alderman v. United States*, 394 U.S. 165, 183; *Dennis v. United States*, 384 U.S. 855, 873-875. As the Supreme Court has stated in a related context, "[a]dversary proceedings * * * will substantially re-

³ Since a warrant was not involved, this seizure is to be tested by reasonableness rather than by probable cause. *In re Dionisio, supra* at 280.

duce [the] incidence [of error] by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information, obtained and suggested by the [*in camera*] materials, will be unable to provide the scrutiny which the Fourth Amendment's exclusionary rule demands." *Alderman v. United States*, *supra* at 184; see also *Dennis v. United States*, *supra* at 874-875.

It is true, of course, that arrest or search warrants normally issue from an *ex parte* proceeding in which a "neutral and detached" magistrate is the only initial buffer between government and citizen. *Aguilar v. Texas*, 378 U.S. 108, 110-111; *Johnson v. United States*, 333 U.S. 10, 13-14. But that procedure provides no analogy for the proper constitutional requisite in the present context. The term "reasonable" as used in the Fourth Amendment, like "due process" in the Fifth, demands a measure of constitutional sufficiency which varies with the situation presented. In the warrant situation, difficulties of locating a suspect or possessor of evidence, the problems of apprehension, the destructibility of evidence, the need for promptness to protect the public against violence and to prevent repetition of criminal conduct necessitate the *ex parte* nature of the warrant issuance proceeding. However, none of these considerations ordinarily underlies a petition to force compliance with a grand jury request for exemplars. Apart from the argument based on the need for secrecy of grand jury proceedings (discussed *infra*), the United States has failed to show how disclosure of its affidavit in an adversary hearing would significantly impair the administration of criminal justice. On the contrary, there is a "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Den-*

nis v. United States, supra at 870; see also *United States v. Amabile*, 395 F.2d 47, 53 (7th Cir. 1968), certiorari denied, 401 U.S. 924.

More important, unlike the warrant situation where the accused will have an opportunity to contest the sufficiency of the warrant on a motion to suppress before he may be tried and imprisoned (Federal Rules of Criminal Procedure 41(e); *Giordenello v. United States*, 357 U.S. 480, 484), here failure to allow the witness effectively to oppose the Government's petition has resulted in an indefinite incarceration for an unchallengeable reason. We cannot condone such manifest unfairness.

The Government argues that the hearing on its petition to enforce the grand jury's direction must be *ex parte* rather than adversary in nature in order to protect the secrecy of grand jury proceedings. By now it should be apparent that "grand jury secrecy" is no magical incantation making everything connected with the grand jury's investigation somehow untouchable. *Dennis v. United States, supra* at 868-873; *United States v. Amabile, supra* at 53. However, even according the secrecy privilege the broadest justifiable scope, disclosure of the present affidavit would not trench upon its boundaries.

We have examined the affidavit and find that it does not recount proceedings before the grand jury. Rather, it states the results the Government derived from its own investigation and then presented to the grand jury. Thus disclosure here cannot be said to discourage the grand jurors from engaging in uninhibited investigation, full discussion, and conscientious voting. Since he is requesting the disclosure, certainly Mara could not be heard to object that the affidavit might reveal disparaging information about him. Moreover, he has been advised that he is a potential

defendant so that the Government cannot convincingly contend that divulging the material in the affidavit would precipitate his flight from prosecution. In any case, the Government is well aware of the means at its disposal to prevent escape.⁴ Finally, the affidavit does not appear to contain information elicited from complainants and witnesses before the grand jury. Where anonymity is necessary to prevent intimidation or preserve sources of information, deletion of the witnesses' identity may be permitted under the proper standards of trustworthiness and reliability. See *Jones v. United States*, 362 U.S. 257, 271-272; *Rugendorf v. United States*, 376 U.S. 528, 533; *Aguilar v. Texas*, *supra* at 114; *Spinelli v. United States*, 393 U.S. 410, 415-419; *United States v. Harris*, 403 U.S. 573.

Disclosure of the affidavit in open court is particularly appropriate where, as here, the information contained therein is the fruit of the Government's own investigatory activity and does not bear the imprint of the grand jury's independent initiative. Such disclosure should serve to curtail any attempt to circumvent the requirements of the Fourth Amendment by interposing the grand jury between it and the citizen under investigation. *In re Dionisio*, *supra* at 280-281; *United States v. Bailey*, *supra* at 803. We conclude that disclosure of information not clearly under the veil of grand jury secrecy is needed to protect citizens from infringement of their Fourth Amendment rights through abuse of the grand jury process.

⁴ If the Government has probable cause to believe that disclosure of its affidavit in an adversary proceeding will precipitate the disappearance of the witness, it may procure a material witness arrest warrant. See *Bacon v. United States*, — F.2d —, 40 U.S.L.W. 2219 (9th Cir. 1971).

The Government sometimes may be unable to carry its burden of showing reasonableness in open court without jeopardizing the values that grand jury secrecy is meant to protect. In such rare instances, the Government may properly approach the court to preserve the confidentiality of those portions of the affidavit which ought not be exposed. We are confident that in deciding what matters may be withheld, the district court will be guided not by a blind obeisance to grand jury secrecy but solely by the purposes which are truly served by this privilege. *Dennis v. United States*, *supra* at 872, note 18; see Federal Rules of Criminal Procedure 6(e).

The substantive showing that the Government must make to justify the order it seeks is that the grand jury's direction to furnish exemplars is "reasonable." *In re Dionisio*, *supra* at 280-281. Reasonableness in this context is not necessarily synonymous with probable cause.⁵ Like the reasonableness requirement applied to a grand jury subpoena to produce documentary evidence, a reasonable direction to furnish exemplars requires that the Government's affidavit show that the grand jury investigation was properly authorized, for a purpose Congress can order, that the information sought is relevant to the inquiry, and

⁵ Although the Supreme Court remarked that it "has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution," *Chambers v. Maroney*, 399 U.S. 42, 51, the reference was to an actual non-consensual intrusion into protected privacy and not to a request to furnish physical characteristics for identification purposes under pain of contempt. The reasonableness requirement means something less than probable cause if the intrusion is limited. See *Terry v. Ohio*, 392 U.S. 1, 24-27. Moreover, the aegis of the grand jury was not involved in *Chambers*.

that the grand jury's request for exemplars is "adequate, but not excessive, for the purposes of the relevant inquiry." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209. Because a request for exemplars is distinguishable from a subpoena duces tecum—indeed it is a unique phenomenon—we interpret "adequate but not excessive" to mean that the Government must affirmatively show that the grand jury process is not being abused.

As the Court indicated in *Dionisio*, it would be an abuse of the grand jury process for the Government to conduct a general fishing expedition under grand jury sponsorship with the mere explanation that the witnesses are potential defendants. 422 F.2d at 281. Consequently, in order to insure that there is a sufficiently explicit connection between the identification evidence sought and the purpose to be served, the Government must submit a somewhat more detailed affidavit than the one previously supplied to the district court. However, this does not mean that there must always be probable cause to believe such evidence will disclose an offense or that the witness committed it.

In addition, we hold it to be an abuse of the grand jury process for the Government to impose on that body to perform investigative work that can be, and heretofore has been, successfully accomplished by the regular investigative agencies of Government. Therefore, the Government's affidavit must also show why satisfactory handwriting and printing exemplars cannot be obtained from other sources without grand jury compulsion.

In accordance with a suggestion in the Government's brief in the *Dionisio* case, *supra*, if the Government makes an adequate showing of reasonableness for the compulsion of these exemplars, they should

be furnished in the grand jury room as part of its process if petitioner prefers that course in lieu of furnishing them to the FBI in the presence of his counsel (in accordance with the option extended him by the Government). See *In re Dionisio, supra* at 279, note 1.

Without an open and sufficiently stringent test of reasonableness to support the order compelling the furnishing of the exemplars, petitioner's incarceration was unjustified. Therefore, the contempt judgment is reversed, and the cause is remanded for further proceedings consistent herewith. Our mandate will issue forthwith.

APPENDIX B**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION****No. 71 GJ 4060****IN RE:****RICHARD J. MARA, also known as, RICHARD J. MARASOVICH, A witness before the September 1971 Grand Jury****ORDER**

On petition of WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, Eastern Division, the court having read and considered said petition and having heard the argument of counsel, finds:

1. The September 1971 Grand Jury for the Northern District of Illinois, Eastern Division, is now conducting an investigation involving possible violations of Title 18, United States Code, Sections 371 and 659.

2. Respondent, Richard J. Mara, also known as Richard J. Marasovich, appeared before said Grand Jury on September 23, 1971 and September 28, 1971. On both occasions, the foreman of the Grand Jury directed the respondent to furnish exemplars of his handwriting and printing, as more fully set forth in the petition of the United States Attorney. On both occasions, the respondent refused to furnish said exemplars asserting his constitutional privilege. Said privilege on each occasion was improperly asserted by the respondent. Respondent has no constitutional privilege to refuse to furnish the handwriting and printing exemplars demanded by the Grand Jury.

IT IS THEREFORE ORDERED that respondent Richard J. Mara, also known as Richard J. Marasovich, furnish before and to the September 1971 Grand Jury of the United States District Court for the Northern District of Illinois, such exemplars of respondent's handwriting and printing as the said Grand Jury deems necessary.

ENTER:

/s/ **Edwin A. Robson**
Chief Judge
United States District Court for
the Northern District of Illinois

Dated at Chicago, Illinois
this 28 day of September, 1971.

APPENDIX C

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

No. 71 GJ 4060

IN RE:

RICHARD J. MARA, also known as, RICHARD J. MARASOVICH, A witness before the September 1971 Grand Jury

JUDGMENT AND COMMITMENT

On motion of WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, for an order by the Court to enforce its order of September 28, 1971, heretofore entered in the above-entitled matter, the respondent, RICHARD J. MARA, appearing before the Court in person and with counsel, and said respondent having admitted that he had refused and would continue to refuse to furnish exemplars of his handwriting and printing before and to the September 1971 Grand Jury, the Court having heard argument of counsel:

IT IS ADJUDGED that respondent, RICHARD J. MARA, is in direct and continuing contempt of this Court for his failure to obey the order of this Court, dated September 28, 1971, heretofore entered herein.

IT IS THEREFORE ORDERED that respondent, RICHARD J. MARA, be and he hereby is committed to the custody of the United States Marshal for the Northern District of Illinois until such time as said respondent shall obey said order.

ENTER:

/s/ Edwin A. Robson
Chief Judge
United States District Court for
the Northern District of Illinois

Dated at Chicago, Illinois
this 28 day of Sept., 1971.

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604**

Friday, October 22, 1971

Before

**Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. OTTO KERNER, Circuit Judge**

No. 71-1740

IN RE: RICHARD J. MARA, a/k/a RICHARD J. MARASOVICH, a witness before the September 1971 Grand Jury

RICHARD J. MARA, APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This matter is before the Court on the emergency motion of Richard J. Mara, Witness-Appellant, for bond pending appeal, and the Government's answer. 28 U.S.C. § 1826 permits the admission of witnesses to bail pending appeal if it appears the appeal is not frivolous or taken for delay. We find that the appeal is not frivolous or taken for delay.

IT IS THEREFORE ORDERED that Richard J. Mara be released pending appeal from the custody of the U.S. Marshal for the Northern District of Illinois after posting a \$2500 cash bond with the Clerk of the District Court for the Northern District of Illinois.

IT IS FURTHER ORDERED, pursuant to 28 U.S.C. § 1826, that the parties observe the following schedule for briefs and argument:

Appellant's brief to be filed on or before October 28. Government's brief to be filed on or before November 4. Appellant's reply brief to be filed on or before November 8. Oral argument set for 2 P.M., November 8.

APPENDIX E

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

*To the Honorable the Judges of the United States
District Court for the Northern District of
Illinois, Eastern Division*

Greetings:

Whereas, lately in the United States District Court for the Northern District of Illinois, Eastern Division before you, or some of you, in a cause between IN RE: SEPTEMBER 1971 GRAND JURY, Witness RICHARD J. MARA, also known as RICHARD J. MARASOVICH; No. 71 O.J. 4060; orders were entered on the twenty-eight day of September 1971 and the eighth day of October, 1971 as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Seventh Circuit by virtue of an appeal by RICHARD J. MARA, a/k/a RICHARD J. MARASOVICH, agreeably to the act of Congress, in such case made and provided, in fully and at large appears,

And Whereas, in the term of September, in the year of our Lord one thousand nine hundred and seventy-one, the said cause came on to be heard before the said United States Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by counsel,

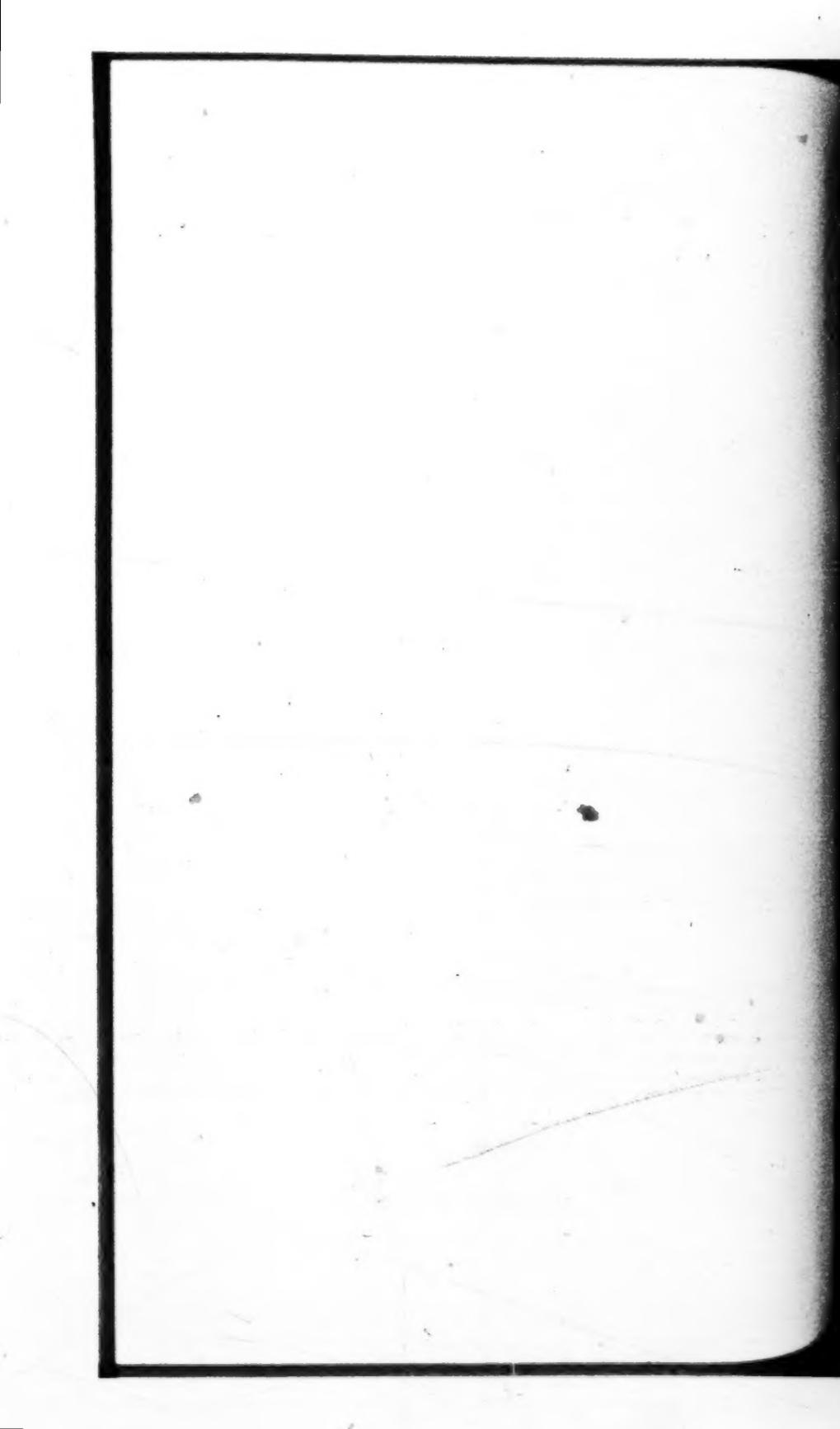
On Consideration Whereof, it is ordered and adjudged by this Court that the contempt judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, and that this cause be and the same is hereby, Remanded to the

said District Court for further proceedings in accordance with the opinion of this Court filed this day.

It Is Further Ordered by the Court that the mandate in this cause issue forthwith as directed in the opinion of this Court filed this day, December 1, 1971.

You, therefore are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, aught to be had, the said judgment notwithstanding. Witness, the Honorable Warren E. Burger, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and seventy-one.

/s/ Kenneth J. Carrick
Clerk of the United
States Court of Appeals
for the Seventh Circuit



In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-229

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO DIONISIO

No. 71-850

UNITED STATES OF AMERICA, PETITIONER

v.

IN RE SEPTEMBER 1971 GRAND JURY, RICHARD J.
MARA, a/k/a RICHARD J. MARASOVICH

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The purpose of this memorandum is to bring to the Court's attention the Second Circuit's recent decision in *United States v. Doe (Cynthia Schwartz)*, No. 663, September Term, 1971, decided March 28, 1972. A copy of that opinion is set forth in the Ap-

(1)

pendix, *infra*. The court in that case affirmed a civil contempt conviction against a grand jury witness for refusing to furnish the grand jury handwriting exemplars. In his opinion for a unanimous court, Chief Judge Friendly rejected the argument that "the use of process to compel the furnishing of handwriting (or voice) exemplars to a grand jury constitutes a search or seizure within the Fourth Amendment which requires a preliminary showing of probable cause to believe that the witness' handwriting (or voice) resembles that of a person whom the Government has probable cause to believe has committed a crime" (Appendix, *infra*, pp. 3a-4a). He further rejected the position that the government must meet "even so apparently modest a requirement as a showing of 'reasonableness' * * *" (*id.* at pp. 9a-10a). In doing so he recognized that "a different view has been taken by the Seventh Circuit" in *Dionisio* and in *Mara*, and expressly declined to follow that court's view on the ground that "neither the reasoning nor the authorities cited [there] are persuasive" (Appendix, *infra*, p. 10a).

As a result, there is now a direct conflict of decisions between the Seventh and the Second Circuits. For this reason and for the reasons stated in the petitions for writs of certiorari in Nos. 71-229 and 71-850, we submit that the petitions should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

APPENDIX

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 663—September Term, 1971.

(Argued March 9, 1972 Decided March 28, 1972.)

Docket No. 72-1209

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN DOE,

In the Matter of the Grand Jury Testimony and
Contempt of CYNTHIA B. SCHWARTZ,

Appellant.

Before:

FRIENDLY, *Chief Judge*,
TIMBERS, *Circuit Judge*, and JAMESON, *District Judge*.*

Appeal from an order of the District Court for the Southern District of New York, Morris E. Lasker, *Judge*, adjudging appellant guilty of civil contempt for refusal to furnish handwriting exemplars to a grand jury.

Affirmed.

*Of the United States District Court for the District of Montana, sitting by designation.

FRIENDLY, Chief Judge:

On January 22, 1972, appellant Cynthia B. Schwartz appeared, pursuant to subpoena, before a grand jury in the Southern District of New York, which was conducting an investigation in regard to possible mail and wire frauds. The Assistant United States Attorney asked her to furnish samples of her writing of the names Cynthia Schwartz, Cynthia B. Brown, Dixbie Management Co., Dixbie Colossal Inc., National Angus of America, and National Beef Corporation. She refused, asserting her privilege against self-incrimination under the Fifth Amendment. On February 2, 1972, Judge Tyler directed her to execute the exemplars and appointed the Legal Aid Society to represent her. After she had again refused, on February 9, she and her counsel appeared before Judge Lasker. Counsel now asserted that the Fourth Amendment required the Government to show the reasonableness of its request. Judge Lasker reserved decision. Prior to another appearance before the judge on February 14, the Assistant, contending that in any event the request for exemplars was reasonable, submitted an affidavit stating that witnesses before the grand jury had indicated there were resemblances between the handwriting on certain exhibits and what they believed to be that of Cynthia B. Schwartz, and that other efforts to obtain specimens of her handwriting had been

unsuccessful. Counsel then took the more advanced position that the Government had the burden of showing "probable cause." On February 14, Judge Lasker directed Mrs. Schwartz to furnish the exemplars. When she again refused, on February 17, the judge cited her for civil contempt and sentenced her for thirty days, unless she sooner furnished the exemplars or the grand jury was discharged. However, he stayed the sentence for a week to permit application to this court for a further stay pending appeal. Another panel extended the stay and set the appeal for argument on March 9. After hearing argument we directed that the stay be vacated at 5:00 P.M. on March 13; this has been extended by the Supreme Court until its further order. We affirm the judgment of the district court.

Although appellant now makes no claim under the Fifth Amendment and relies solely on the Fourth, it is important for the latter purpose to underscore that no basis for a Fifth Amendment claim exists. *Gilbert v. California*, 388 U.S. 263, 265-67 (1967), held that the furnishing of handwriting exemplars did not constitute testimony within the protection of the self-incrimination clause. Combination of that holding with *United States v. Wade*, 388 U.S. 218, 222-23 (1967), leads inevitably to the conclusion that this is true even when a witness is asked to furnish specimens of his writing of names or words that had been used in the commission of a crime. We so held in *United States v. Doe (Devlin)*, 405 F.2d 436, 438-39 (2 Cir. 1968). Furthermore, whereas *Gilbert and Wade* had been concerned only with claims that the compelled furnishing of exemplars constituted compulsory self-incrimination and consequent error, *Doe* added the scarcely surprising gloss that, since no privilege existed, refusal to furnish handwriting exemplars justified a moderate sentence for civil contempt.

Appellant's argument is that the use of process to compel the furnishing of handwriting (or voice) exemplars to a